

No. PD-0753-20

IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
1/13/2021  
DEANA WILLIAMSON, CLERK

**BETHANY GRACE MACIEL, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

Appeal from Brazos County

\* \* \* \* \*

**STATE'S BRIEF ON THE MERITS**

\* \* \* \* \*

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## **NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT**

\*The parties to the trial court's judgment are the State of Texas and Appellant, Bethany Grace Maciel.

\*The case was tried before the Honorable Amanda Matzke, Presiding Judge, Brazos County Court at Law 1, Bryan, Brazos County, Texas.

\*Counsel for Appellant at trial and on appeal was Jake Spiegelhauer, James, Reynolds & Spiegelhauer, 100 N. Parker Ave., Suite 114, Bryan, Texas 77803.

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\* \* \* \* \*

**STATE’S BRIEF ON THE MERITS**

\* \* \* \* \*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Necessity is a “confession and avoidance” defense. That (currently) requires an admission, in some form, to both the requisite act and culpable mental state. Admission to one can often be inferred from admission to the other. What happens when a defendant never concedes the act required for an offense that has no culpable mental state? The result in this case is the negation of the only element at issue, and the proper denial of a necessity instruction.

**STATEMENT REGARDING ORAL ARGUMENT**

The Court did not grant oral argument.

## **STATEMENT OF FACTS**

Appellant's recitation omitted key evidence and other considerations relevant to the defense she presented.

The State's theory, as indicated by its charging instrument and opening statement, was that appellant not only operated but drove drunk that night.<sup>1</sup> This was undoubtedly informed by her repeated admissions to the officer and by the officer's body camera video, which shows nothing to the contrary.<sup>2</sup>

Appellant's cross-examination of the officer covered a lot of ground. The officer conceded 1) he did not see who drove the car to where he found it,<sup>3</sup> 2) he never specifically asked appellant whether she drove from the bar to that place,<sup>4</sup> 3) he did not know if the car was capable of being moved,<sup>5</sup> 4) appellant never moved it from that place,<sup>6</sup> and 5) leaving a car in the road—even at 1:00 a.m. on a Sunday morning—was dangerous.<sup>7</sup> Counsel spent considerable time suggesting, through questions, that someone who was personally incapable of moving the car from its last

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<sup>1</sup> 1 CR 5-6 ("driving" was added to the statutory language); 2 RR 11-13.

<sup>2</sup> 2 RR 29, 30, 55, 102-03; State's Ex. 3 (officer's body camera video).

<sup>3</sup> 2 RR 77-78, 88-89.

<sup>4</sup> 2 RR 82, 88-89.

<sup>5</sup> 2 RR 80.

<sup>6</sup> 2 RR 81-82.

<sup>7</sup> 2 RR 90-92.

position probably could not have gotten the car there from the bar.<sup>8</sup>

Defense counsel's deferred opening said the evidence would show appellant's brother was driving when he suddenly stopped and began to vomit.<sup>9</sup> Appellant, drunk and panicked about her brother, climbed into the driver's seat to move the car safely off the road but she was too drunk.<sup>10</sup> Counsel suggested an explanation:

She wasn't trying to drive home at that point. She was trying to get them off the road, get the car to safety. As you've heard, that's a dangerous situation to be in.

...

What she didn't do was make the mistake of trying to drive the vehicle home, trying to operate the vehicle beyond getting it off the road out of danger.<sup>11</sup>

Appellant's testimony delivered some of what counsel promised. Relevant to what appellant did after her brother allegedly stopped the car and vomited, direct examination revealed only that appellant was scared about being in the middle of the road, tried to move the car to the closest parking lot, but could not move it.<sup>12</sup> It was clear from the prosecutor's cross-examination that he had serious doubts about this

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<sup>8</sup> 2 RR 85-88.

<sup>9</sup> 3 RR 67-68.

<sup>10</sup> 3 RR 68.

<sup>11</sup> 3 RR 68-69.

<sup>12</sup> 3 RR 89-90, 94.

version of events, which he had never heard before.<sup>13</sup> Why did appellant not ask the officer for help for her brother, or tell the officer her brother had been driving? Appellant said she was drunk, scared, confused, and the officer never asked.<sup>14</sup> Appellant agreed that she told the officer she was driving, which she attributed at trial to confusion, but pointed out that she had denied “operating” the car.<sup>15</sup> When pressed on operating the car, the following exchange took place:

Q: Just -- what you are asking this jury to believe is that yes, you were intoxicated but you weren't driving or even operating the vehicle that night; is that right?

A: What does “operating” mean, again?

Q: That's for the jury to decide. What do you think it means?

A: I couldn't get the car to move, so I wasn't driving. I don't think I was operating it.

Q: We can see from the video you are manipulating the controls of the car, using the brake pedal. The car is running. By your own admission, you were trying to move it but just can't figure out how. You are saying that's not operating that vehicle?

A: I am not sure.<sup>16</sup>

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<sup>13</sup> 3 RR 101.

<sup>14</sup> 3 RR 98-101.

<sup>15</sup> 3 RR 100.

<sup>16</sup> 3 RR 101-02.

The prosecutor ended his cross-examination of appellant by pointing out the convenience of presenting this version of events now that the statute of limitations had run on prosecuting her brother, who was not there to explain himself.<sup>17</sup>

In closing argument, the State insisted appellant drove the car from the bar that night.<sup>18</sup> If the jury had a doubt about that, however, appellant “by her own admission, [did] everything possible to effect the functioning of that vehicle” once it was stopped in the road.<sup>19</sup> That she was too drunk to get the car moved before the police showed up meant only that the elements of DWI were easily satisfied.<sup>20</sup>

Defense counsel argued that it made no sense that appellant drove to where she was found and suddenly forgot how to operate her own car.<sup>21</sup> But the recurring theme was the definition of “operating.” “So then you have to ask yourself . . . is sitting behind the wheel with the engine on, does that constitute operating a vehicle?”<sup>22</sup> On this point, he vigorously attacked the “operating” element. He repeatedly told the

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<sup>17</sup> 3 RR 102-03. In response, appellant’s friend testified that appellant told her the same story the day after the incident. 3 RR 110.

<sup>18</sup> 3 RR 127.

<sup>19</sup> 3 RR 127.

<sup>20</sup> 3 RR 127.

<sup>21</sup> 3 RR 130.

<sup>22</sup> 3 RR 130.

jury it could do what it wanted.<sup>23</sup> But he offered guidance. First, the jury should consider that the car never moved.<sup>24</sup> “You have to ask yourself, you know, what is the law really designed for, okay? It’s not designed for somebody sitting there in the vehicle, unable to move it, unable to operate it.”<sup>25</sup> Second, the jury should consider appellant’s intent. Even if what she did was technically “operating,” “you can also still consider the motive. She wasn’t trying to operate the vehicle to drive it. She was trying to operate the vehicle to get it off the road. That matters. It should matter. It does matter.”<sup>26</sup>

The State’s rejection of appellant’s case can be summed up in these excerpts:

- “So the car is running. She’s trying to drive it. She says she was driving it. She says she is still trying to drive it. That’s operation.”<sup>27</sup>
- “She had either driven it to that point and was going to drive it some more or she did drive it to that point. She was working the controls at the time. That’s operation, folks.”<sup>28</sup>

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<sup>23</sup> 3 RR 128 (“[The prosecutor] do[es]n’t get to tell you what driving while intoxicated is. Ultimately, you get to decide that.”), 131 (“Again, he doesn’t get to tell you that that’s operating a vehicle. He doesn’t get to decide that for you. That’s up for you to decide.”).

<sup>24</sup> 3 RR 130-31.

<sup>25</sup> 3 RR 132.

<sup>26</sup> 3 RR 131-32.

<sup>27</sup> 3 RR 137.

<sup>28</sup> 3 RR 140.

## **SUMMARY OF THE ARGUMENT**

The burden to obtain an instruction on necessity is low, and rightfully so. All it required in this case was some admission to the act of “operation” of a vehicle. Instead, appellant alternatively denied operating her vehicle and claimed to be unsure, and mounted a defense based primarily on the absence of any vehicular movement. She did not present a necessity defense, even under this Court’s lenient standard.

## **ARGUMENT**

I. Justification defenses are fairly straightforward in the usual case.

I.A. Entitlement to justification defenses is important.

The defense of necessity is a justification for conduct.<sup>29</sup> This means the doctrine of confession and avoidance applies to necessity.<sup>30</sup> Because “conduct” is defined as “an act or omission and its accompanying mental state,”<sup>31</sup> a defendant has to effectively admit both.<sup>32</sup> That is why the instruction, when deserved, is crucial; “[t]he absence of this type of instruction . . . leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense.”<sup>33</sup>

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<sup>29</sup> TEX. PENAL CODE § 9.22 (“Conduct is justified if . . .”). *See generally id.* at 9.02 (“It is a defense to prosecution that the conduct in question is justified under this chapter.”).

<sup>30</sup> *Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010).

<sup>31</sup> TEX. PENAL CODE § 1.07(a)(10).

<sup>32</sup> *Juarez*, 308 S.W.3d at 399.

<sup>33</sup> *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

I.B. Entitlement can be earned despite equivocation.

Despite the apparent simplicity of a “yes, but” defense, a confession is sometimes harder to discern than it should be. This Court errs on the side of entitlement when the defense is at least a colorable option for jurors. The rule, established in *Juarez* and recently reiterated in *Ebikam*, is that “an inconsistent or implicit concession of the conduct will meet the requirement. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction.”<sup>34</sup> That is, a defendant can say both “yes” and “no” and still get the instruction, but there must be a “yes”—even if it is implicit. This is the only rational way to reconcile a doctrine based in trading pleadings until an issue of law or fact is joined, one on hand, with the general rule that a defendant deserves an instruction even if the evidence is weak, impeached, or contradicted, on the other.<sup>35</sup>

This Court has shown how this works. With a result-oriented offense like assault, for example, it should be enough to admit to purposefully doing something that caused the alleged injury. That is what happened in *Juarez*. Juarez was asked point-blank whether he acted with any of the three culpable mental states for

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<sup>34</sup> *Ebikam v. State*, PD-1199-18, 2020 WL 3067581, at \*3 (Tex. Crim. App. June 10, 2020) (not designated for publication).

<sup>35</sup> *See Juarez*, 308 S.W.3d at 402, 405-06.

aggravated assault on a peace officer.<sup>36</sup> He denied it.<sup>37</sup> He went so far as to say it was an accident.<sup>38</sup> However, Juarez also clearly explained that he bit the officer's finger to get the officer off of him because he could not breathe.<sup>39</sup> This Court pointed out that any of the three mental states could have been reasonably inferred from his admitted acts—as they usually are.<sup>40</sup>

Similarly, a conduct-oriented offense can be adequately confessed to—despite a denial—if the defendant openly admits to acts that invite the necessary inference. That was the case in *Gamino*. Gamino was convicted of aggravated assault by threat with a deadly weapon.<sup>41</sup> Gamino denied the conduct alleged by the complainant, *i.e.*, saying “I got something for you” and pointing his handgun at him.<sup>42</sup> But Gamino explained that he felt scared, drew his handgun in self-defense, and told the complainant, “Stop, leave us alone, get away from us.”<sup>43</sup> This Court held that was “the equivalent of an admission that he threatened the complainant with imminent

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<sup>36</sup> *Id.* at 400. The concurrence lays out a more detailed version of his testimony. *Id.* at 406-08 (Holcomb, J., concurring).

<sup>37</sup> *Id.* at 400.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 400, 405.

<sup>40</sup> *Id.* at 405, 405 n.48.

<sup>41</sup> *Gamino v. State*, 537 S.W.3d 507, 508 (Tex. Crim. App. 2017).

<sup>42</sup> *Id.* at 509.

<sup>43</sup> *Id.*

harm.”<sup>44</sup> “It would have been reasonable . . . for the jury to infer that the words, ‘or else I will have to use this gun to protect us,’ were implied.”<sup>45</sup>

In both cases, then, simple admissions to underlying facts giving rise to necessary inferences can support a justification instruction.

I.C. The main ingredient seems to be strategic intent.

When this Court’s latest integration and distillation of this area of law, *Ebikam*, is examined, the lesson appears to be that a defendant who attempts to take responsibility for the offense will not be denied a justification instruction because she does not neatly check all the elemental boxes. That is a fair standard, and sets a low threshold for defendants trying to justify (rather than deny) their actions. It also properly places the focus on what the defense is trying to communicate to the jury, not on some rote confession of guilt. *Ebikam* also reaffirmed the idea that the harm is related to the quality of the admission.<sup>46</sup> As *Juarez* and *Gamino* illustrate, a justification instruction is necessary—and its absence harmful—when a defendant’s admission makes conviction a foregone conclusion without it.<sup>47</sup> Considered as a

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<sup>44</sup> *Id.* at 511.

<sup>45</sup> *Id.* at 512. A corollary to this is that the factual allegations in a result-oriented offense do not have to be conceded so long as the parties are talking about the same unit of prosecution. *Ebikam*, 2020 WL 3067581, at \*4.

<sup>46</sup> *Ebikam*, 2020 WL 3067581, at \*3.

<sup>47</sup> As explained below, if appellant was entitled to a necessity instruction, the harm analysis on remand will not be as straightforward because appellant’s “admissions” and the record as a whole  
(continued...)

whole, the law currently settles most cases of requested justification because it is plain, from the offense and evidence, what defense the defendant was trying to present.

II. This is not the usual case.

II.A. A defendant should do her best to admit operating a vehicle.

This case is not like *Juarez* or *Gamino*, as a matter of law or fact. The offense of driving while intoxicated is a strict liability offense; it does not require a specific mental state, only a person on a public roadway voluntarily operating a vehicle while intoxicated.<sup>48</sup> Removing the mental-state issue should simplify things. Unfortunately, focusing solely on the act makes the analysis in this case more complicated because “operating” is not defined by statute and has not acquired a technical meaning.<sup>49</sup> In theory, a defendant could beg and plead for the jury to agree she operated a vehicle, and the jury could decline. The jury’s prerogative is at the core of the issue in this case: how does one confess to committing conduct the jury has the power to define for itself?

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<sup>47</sup>(...continued)  
served to negate the “operating” element, not to justify prohibited conduct.

<sup>48</sup> *Farmer v. State*, 411 S.W.3d 901, 905 (Tex. Crim. App. 2013); TEX. PENAL CODE § 49.04(a).

<sup>49</sup> *Kirsch v. State*, 357 S.W.3d 645, 650 (Tex. Crim. App. 2012).

The answer cannot be to ignore that element. Necessity requires the actor “believe[] the conduct is immediately necessary to avoid imminent harm.”<sup>50</sup> An actor cannot believe conduct is necessary if she does not believe she is committing it. Similarly, the core of necessity is the jury’s determination that “the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.”<sup>51</sup> It compares what is prohibited to the prohibition’s purpose. Section 49.04(a) seeks to avoid personal injury by prohibiting “operating” while intoxicated, not revving an engine or handling a shifter. Regardless of whether “operating” may be proven by those actions in a given case, that is not how the Legislature has defined the offense or, as a result, the defense.<sup>52</sup> If necessity is a confession and avoidance defense, the confession should be to “operating.”

Rather than excuse a defendant’s denial or agnostic approach to this elemental act, the possibility that the jury can acquit her without considering any justification is all the more reason for a defendant to clearly state her position. After all, the party seeking to interpose a justification is the one who bears the burden of production.<sup>53</sup>

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<sup>50</sup> TEX. PENAL CODE § 9.22 (1).

<sup>51</sup> TEX. PENAL CODE § 9.22 (2).

<sup>52</sup> It could be that “non-driving” DWI cases are naturally a poor fit for the necessity defense. That could explain why appellant did not embrace it at trial.

<sup>53</sup> *Shaw v. State*, 243 S.W.3d 647, 657 (Tex. Crim. App. 2007).

While this evidence might come from any source, it is the defendant's burden to make sure the *prima facie* case has been made.<sup>54</sup> If there is a risk that a defendant's "admission" could appear inadequate on its face because of the nature of the offense, she should be the one to bear it. In this case, it should mean committing to operating the vehicle or, at least, equivocating between "yes" and "no."

## II.B. Appellant's defense disclaimed operation, explicitly and implicitly.

Appellant said two things about operating: "I don't think I was operating [the car,]" and "I am not sure."<sup>55</sup> Neither of those is an admission to operation. Appellant does not disagree. Before this Court, she is careful to avoid saying she took responsibility for committing a crime, or that she made an equivocal admission to this element. Importantly, she does not even argue that the jury could infer a confession. Instead, she argues that she was entitled to the instruction because she "at the very least did not deny" the underlying facts or "flat out deny the conduct in its entirety."<sup>56</sup> Her entitlement argument boils down to this: her testimony would support a conviction. That is true, but incidentally providing enough evidence to get convicted does not a necessity defense make. Comparison with *Juarez*, upon which she exclusively relies, shows why.

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<sup>54</sup> *Id.*

<sup>55</sup> 3 RR 102.

<sup>56</sup> App. Br. at 12, 15.

Juarez repeatedly admitted to biting the officer's finger. He said he "bit down hard."<sup>57</sup> There was no question that it caused injury. In fact, Juarez could not plausibly argue that biting someone hard does not cause bodily injury as that term is defined.<sup>58</sup> We thus know his admissions were sufficient because his defense was hopeless without the necessity instruction.<sup>59</sup> Put another way, Juarez freely admitted doing the act that all but proved his guilt.

In contrast, appellant freely admitted actions that are not obviously "operation." She did not think so. Whether her actions constituted "operating" was, as in the cases cited by appellant,<sup>60</sup> a contested issue. Unlike Juarez, appellant could plausibly argue that what she did was not the conduct prohibited by the statute. As explained below, that is what is striking about this case as compared to normal justification cases: she made a complete defense without the justification instruction.

A more analogous—but still distinguishable—case is *Villa v. State*.<sup>61</sup> Villa was charged with aggravated sexual assault of a three-year-old by penetration of her

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<sup>57</sup> *Juarez*, 308 S.W.3d at 408 (Holcomb, J., concurring).

<sup>58</sup> TEX. PENAL CODE § 1.07(a)(8) ("Bodily injury" means physical pain, illness, or any impairment of physical condition.").

<sup>59</sup> The same is true of Gamino. No defense attorney wants to argue, "My client did not threaten anyone. He merely brandished a firearm and told the complainant to stay away."

<sup>60</sup> App. Br. at 9-10.

<sup>61</sup> 417 S.W.3d 455 (Tex. Crim. App. 2013).

sexual organ.<sup>62</sup> The issue was whether Villa sufficiently admitted penetration to obtain an instruction on the medical-care defense for his claimed application of diaper-rash ointment.<sup>63</sup> Like “operating,” “penetration” has not acquired a definition suitable for juries.<sup>64</sup> This Court held that, despite Villa’s repeated denials, his agreement at trial to “actually touching the genitals of [the victim]” and denial of putting his finger “between her vulva *and into* her vagina” were admissions “to conduct that amounts to criminal penetration under the Texas Penal Code.”<sup>65</sup> This was not the recognition that a jury *could* decide that he admitted to penetration. Rather, it was the recognition that Villa’s testimony raised what amounted to “a disagreement as to the degree of penetration committed by [him].”<sup>66</sup> That is, there is no amount of “inside a victim’s sexual organ” that is not “penetration.” That is simply not the case with “operation,” at least in this case.

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<sup>62</sup> *Id.* at 459.

<sup>63</sup> *Id.* at 458. *See* TEX. PENAL CODE § 22.011(d) (“It is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party.”), made applicable to aggravated sexual assault by TEX. PENAL CODE § 22.021(d).

<sup>64</sup> *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015).

<sup>65</sup> *Villa*, 417 S.W.3d at 459, 461, 462 (emphasis in original). As a result, this Court did not reach the issue of whether recanted pretrial admissions could satisfy the confession and avoidance doctrine. *Id.* at 461. Appellant has not made that argument.

<sup>66</sup> *Id.* at 462.

As appellant reminded the jury, it gets to decide what “operating” means. Unlike what Villa admitted to, what appellant said she did was not “operation” as a matter of law. And, looking backwards from closing argument, her testimony looks designed for an “operating” defense. All of the questions defense counsel asked dovetailed with that argument: she did not drive there, and the car possibly could not and certainly did not move. Counsel even integrated the core of necessity by arguing that motive for attempting to move the car should matter when defining the offense. Although unsuccessful, the defense was more than viable. It was what any competent attorney would argue in a “non-driving” DWI case. Counsel would not have been able to do that with a client “who ha[d] admitted to all the elements of the offense[,]”<sup>67</sup> which is the hallmark of confession and avoidance. The reason appellant’s closing argument dovetailed so nicely with her testimony seems clear: appellant never presented a necessity defense.

### III. Conclusion

This Court has repeatedly said that a defendant’s flat denial of an element will deprive her of a justification defense.<sup>68</sup> But it should take more than simply not doing

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<sup>67</sup> See *Cornet*, 417 S.W.3d at 451.

<sup>68</sup> *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) (“[A defendant] cannot both invoke self-defense and flatly deny the charged conduct.”); *Juarez*, 308 S.W.3d at 406 (“As a result, a defendant cannot flatly deny the charged conduct—the act or omission and the applicable culpable mental state.”); *Ebikam*, 2020 WL 3067581, at \*3 (“A flat denial of the conduct in question will foreclose an instruction on a justification defense.”) (citing *Ex parte Nailor*, 149 S.W.3d 125, 134 (continued...))

that to entitle a defendant to an instruction purportedly based in confession and avoidance. Appellant's defense to DWI was, in order, 1) she did not drive there, 2) she did not operate the car once it stopped, 3) the car never moved, and 4) she was not trying to drive it home. Necessity was implicated by the fourth claim but nullified by the first and second. Appellant was not entitled to have the jury instructed on it.

**PRAYER FOR RELIEF**

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's conviction and sentence.

Respectfully submitted,

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<sup>68</sup>(...continued)  
(Tex. Crim. App. 2004), and *Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999)).

## **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,885 words.

/s/ John R. Messinger  
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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 7<sup>th</sup> day of January, 2021, the State's Brief on the Merits has been eFiled and electronically served on the following:

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/s/ John R. Messinger  
John R. Messinger  
Assistant State Prosecuting Attorney

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Stacey Soule on behalf of John Messinger  
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Associated Case Party: Bethany Maciel

Name	BarNumber	Email	TimestampSubmitted	Status
Jake Spiegelhauer		jake@jamesandreynolds.com	1/7/2021 4:23:40 PM	SENT

Associated Case Party: David Higginson

Name	BarNumber	Email	TimestampSubmitted	Status
David Higginson		dhigginson@brazoscountytexas.gov	1/7/2021 4:23:40 PM	SENT

Associated Case Party: Stacey Soule

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	1/7/2021 4:23:40 PM	SENT